



MAURA HEALEY  
ATTORNEY GENERAL

# THE COMMONWEALTH OF MASSACHUSETTS OFFICE OF THE ATTORNEY GENERAL

ONE ASHBURTON PLACE  
BOSTON, MASSACHUSETTS 02108

(617) 727-2200  
[www.mass.gov/ago](http://www.mass.gov/ago)

September 11, 2018

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460

**Re: Request for Information under Freedom of Information Act (5 U.S.C. § 552)**

Dear National Freedom of Information Officer:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, and its implementing regulations, the Massachusetts Office of the Attorney General ("MA AGO") makes this request for records ("Request") to better understand the U.S. Environmental Protection Agency's ("EPA") proposal entitled "Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program," 83 Fed. Reg. 44,746 (August 31, 2018) ("Proposal"). In the Proposal, EPA proposes to replace the Clean Power Plan, 80 Fed. Reg. 64,662 (October 23, 2015), with new greenhouse gas emission guidelines for existing power plants under section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d).

## **Requested Records**

The MA AGO requests that EPA produce the following records, as that term is defined at 5 U.S.C. § 552(f):

- 1) Any and all benefit cost analyses, studies, assessments, or any other records that evaluate, identify, calculate, or characterize the costs and/or benefits of the Clean Power Plan, to the extent such records were completed on or after January 20, 2017.
- 2) All studies, reports, planning documents, supporting workpapers, or any other records from which data, estimates, or assumptions were drawn in evaluating, identifying, calculating, or characterizing the costs and/or benefits of the Clean Power Plan, to the extent such records were considered on or after January 20, 2017.

This Request is not intended to exclude any other records that, although not specifically requested, are reasonably related to the subject matter of this Request. Please provide your responses to this Request on a rolling basis and within twenty (20) businesses days, as required



by FOIA. Responsive information is needed to inform the public regarding the public comment period for the Proposal, which has already commenced and ends on October 31, 2018. If possible, please provide any responsive records in electronic format. Please *do not* provide the records in a single “batched” .PDF file.

To the extent EPA deems any requested record or portion thereof exempt from production pursuant to one or more exemptions set forth at 5 U.S.C. § 552(b), please provide an explanation for each such record or portion thereof sufficient to identify the record and the particular exemption(s) claimed.

### **Fee Waiver Requested**

The MA AGO respectfully requests a waiver of fees associated with this Request because, for the reasons set forth below, disclosure of the requested information “is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). Each of the four factors used by EPA to assess the applicability of the first fee-waiver requirement demonstrate that a waiver is proper here. *See* 40 C.F.R. § 2.107(l)(2)(i)–(iv). The second fee-waiver requirement is not applicable, as this Request is of no commercial interest to the MA AGO; the MA AGO is a governmental entity and will realize no commercial benefit from the requested records. *See id.* § 2.107(l)(3); 5 U.S.C. § 552(a)(4)(A)(iii).

#### ***i. The Subject of the Request Concerns the Operations or Activities of the Government.***

The requested records directly and clearly concern the “operations or activities of the government.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). Under section 111(d) of the Clean Air Act, EPA “shall” establish standards of performance for existing stationary sources that emit dangerous air pollutants, including power plants. 42 U.S.C. § 7411(d); *see also Amer. Elec. Power v. Connecticut*, 564 U.S. 410, 426–27 (2011). EPA promulgated the Clean Power Plan and issued the Proposal pursuant to section 111(d). The information sought by this Request will assist the public’s understanding of the Proposal—specifically, EPA’s proposed decision to replace the Clean Power Plan and the impacts thereof. The requested records also will assist the public’s understanding of the costs and benefits of various methods of controlling greenhouse gas emissions from the electric power sector as required by the Clean Air Act.

#### ***ii. The Disclosure Is Very Likely to Contribute to an Understanding of Government Activities and Operations.***

The disclosure is very likely to contribute to an increased public understanding of government activities or operations. *See* 40 C.F.R. § 2.107(l)(2)(ii). The requested information is critically important to the public’s understanding of the Proposal. This information likely will be highly informative because of its potential to shed significant light on the merits and impacts of EPA’s proposed decision to replace the Clean Power Plan with revised emissions guidelines,

as well as cost-effective measures that EPA might opt to pursue to satisfy its statutory obligation to protect human health and the environment by controlling power-sector greenhouse gas emissions.

The public has a considerable interest in information that will aid it in understanding and appraising EPA's evaluation of the costs and benefits of various strategies to reduce power-sector greenhouse gas emissions, including the Clean Power Plan. Americans are deeply concerned about the significant and adverse impacts of climate change on families and businesses.<sup>1</sup> For instance, sea-level rise related to climate change will increase the frequency and extent of flooding associated with coastal storms.<sup>2</sup> In Boston alone, cumulative damage to buildings, their contents, and associated emergency costs could be as high as \$94 billion in 2000–2100.<sup>3</sup> In January 2018, a powerful winter storm caused significant coastal flooding in Massachusetts and resulted in a high tide in Boston of 15.16 feet—the highest tide since recordkeeping began in 1921.<sup>4</sup> The Northeast region has also experienced the country's biggest increases in heavy precipitation events over the past 60 years.<sup>5</sup> Without meaningful reduction in greenhouse gas pollution, including from the electric power sector, the impacts of climate change will only worsen.<sup>6</sup>

The requested information is very likely to aid the public in understanding EPA's efforts and options to control climate-warming greenhouse gas emissions from the power sector, and to facilitate the public's informed engagement in the public comment period on the Proposal.

***iii. The Disclosure Is Likely to Contribute to an Understanding of the Subject by the Public.***

The MA AGO has a deep interest in the Proposal, and disclosure of records sought by this Request will assist the MA AGO in assessing how EPA took account of the impacts on Massachusetts and other states in developing the Proposal. The MA AGO intends to analyze the information disclosed pursuant to this Request and inform the public of any newsworthy information. The disclosure therefore will contribute to the understanding of the subject of the Request by a broad public audience. See 40 C.F.R. § 2.107(l)(2)(iii).

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<sup>1</sup> See *Yale Climate Opinion Maps – U.S. 2016*, YALE PROG. ON CLIMATE CHANGE COMMUNICATION (2018), <http://climatecommunication.yale.edu/visualizations-data/ycom-us-2016/?est=happening&type=value&geo=county>.

<sup>2</sup> See U.S. GLOBAL CHANGE RESEARCH PROGRAM, CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT, VOLUME I, at 27 (D.J. Wuebbles et al. eds., 2017), <https://science2017.globalchange.gov/>.

<sup>3</sup> *Id.* at 379. See also See Massachusetts-specific data available at <https://www.ucsusa.org/sites/default/files/attach/2018/06/underwater-data-bystate.xlsx>.

<sup>4</sup> Martin Finucane, *It's official: Boston breaks tide record*, BOSTON GLOBE, Jan. 5, 2017, at <https://www.bostonglobe.com/metro/2018/01/05/official-boston-breaks-tide-record/UPbwDxgF0QXNOWvB9bcQ7L/story.html>.

<sup>5</sup> Horton et al., *Northeast*, in CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT, 373 (2014), <http://nca2014.globalchange.gov/report/regions/northeast>.

<sup>6</sup> See generally U.S. GLOBAL CHANGE RESEARCH PROGRAM, *supra*.

Because of its routine engagement with the public and press, and its role as a state agency, the MA AGO is particularly well-suited to present the requested information to the public in a matter that is accessible and understandable to non-experts. The MA AGO engages regularly with the public, and serves as a source of information to promote public understanding of issues, while advocating in the public interest. The MA AGO regularly issues press releases in connection with its work that are made publicly available.<sup>7</sup> Representatives of the MA AGO frequently speak on issues of public concern. The MA AGO also posts regularly on issues of public concern to the MA AGO Twitter account, which has over 80,000 followers.<sup>8</sup>

The MA AGO's Energy & Environment Bureau has specialized expertise in environmental regulation, and its Environmental Protection Division regularly engages in enforcement of states and federal environmental laws. The MA AGO has a long history of participating in regulation to ensure that public health and welfare are adequately protected from air pollutant emissions, including greenhouse gas emissions. For example, in 2003, Massachusetts joined other states and organizations in suing EPA to compel regulation of greenhouse gas emissions under the Clean Air Act. *See Massachusetts v. EPA*, 549 U.S. 497 (2007). EPA subsequently found that greenhouse gases endanger public health and welfare. Massachusetts joined EPA and other states and organizations in defending against litigation challenging EPA's finding. *See Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) (per curiam), *cert. granted in part on other grounds*, 134 S. Ct. 418 (2013), *aff'd in part, rev'd in part*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014). More recently, Massachusetts joined EPA and other states and organizations in defending the Clean Power Plan against litigation challenging the rule. *West Virginia v. EPA*, D.C. Cir. No. 15-1363.

***iv. The Disclosure Is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.***

Disclosure of the requested records will significantly enhance the public's understanding, as compared to the level of public understanding that exists prior to the disclosure. *See* 40 C.F.R. § 2.107(l)(2)(iv). Specifically, the requested information will help the public better understand the potential options for controlling power-sector greenhouse gas pollution, and EPA's related actions, including the Proposal. While the public is very familiar with the contribution of carbon dioxide to climate change, it is less familiar with EPA's Proposal, including how the costs and benefits of the Proposal compare to the costs and benefits of the Clean Power Plan. Disclosure of the requested records will help the public better understand the significance and merits of EPA's proposed decision to replace the Clean Power Plan.

Notably, EPA has provided a benefit cost analysis of four illustrative scenarios related to the Proposal, including a scenario in which the Clean Power Plan is repealed. EPA also has made various claims regarding the impacts of replacing the Clean Power Plan as set forth in the Proposal. However, EPA has not provided the public with the full array of analyses, studies, and

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<sup>7</sup> *See News and Announcements*, Office of Attorney General Maura Healey, <https://www.mass.gov/orgs/office-of-attorney-general-maura-healey/news>.

<sup>8</sup> *See* <https://twitter.com/MassAGO>.

assessments of the costs and benefits of the Clean Power Plan under the current Administration. The requested information would substantially aid the public's ability to evaluate EPA's claims and information in and regarding the Proposal, including EPA's justifications for its proposed decision to replace the Clean Power Plan as set forth in the Proposal.

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Please send a copy of the requested records to my attention at the Office of the Attorney General, One Ashburton Place, 18<sup>th</sup> Floor, Boston, Massachusetts, 02108. If the MA AGO's request for a fee waiver is denied, please contact me before incurring any costs in responding to this Request. Additionally, if you have any questions or wish to clarify any aspect of this Request, please do not hesitate to contact me by phone: (617) 963-2674, or email: [megan.herzog@state.ma.us](mailto:megan.herzog@state.ma.us).

Thank you for your attention to this matter. I look forward to receiving your response.

Sincerely,

A handwritten signature in black ink, appearing to read 'Megan Herzog', with a stylized flourish at the end.

Megan M. Herzog  
Special Assistant Attorney General  
Environmental Protection Division